UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

HARLAN NURSING HOME, INC.

Petitioner

and Case 9-UC-462

UNITED STEELWORKERS OF
AMERICA, AFL-CIO-CLC

Union

DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, [1]/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Petitioner (Employer) is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

I. PRELIMINARY STATEMENT:

The Petitioner is engaged in the operation of a 143-bed nursing home located in Harlan, Kentucky. On December 1, 1981, the Union was certified as the collective-bargaining representative in the following stipulated unit employed by the Petitioner's predecessor, [2]/ Harlan Health Care Center:

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[1]/ The Petitioner and the Union timely filed briefs which I have carefully considered in reaching my decision.

[2]/ The facility was purchased by the Petitioner in April of 1985.

> All full-time and regular part-time service and maintenance employees employed by the [Petitioner] at its Harlan, Kentucky nursing home, including LPNs, nurses' aides, orderlies, ward clerks, dietary employees, housekeeping and laundry employees, but excluding all registered nurses, the receptionist/executive secretary, the business office manager, the activities director, the social service director, the dietary director, the maintenance director, the housekeeping director, the director of nursing, and all professional employees, guards and supervisors as defined in the Act.

After purchasing the facility, the Petitioner continued to recognize and bargain with the Union as the representative of the employees in the unit.

Since purchasing the facility in 1985, the Petitioner has entered into a series of collective-bargaining agreements with the Union covering the unit, the most recent of which is effective by its terms from September 1, 1998 until August 31, 2001. At some point in time between 1992 and 1998, the parties added the classifications of rehabilitation aides and medical records tech to the certified unit. At the time of the hearing, the unit was estimated to include 75 individuals.

In its petition, the Petitioner seeks to clarify the unit to exclude the four licensed practical nurses (LPNs) currently in the unit on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Union contends, as a threshold issue, that the Petitioner is precluded from raising, in a clarification proceeding, the supervisory status of the LPNs, absent newly discovered or previously unavailable evidence or special circumstances, which are not present in the subject case. In any event, the Union asserts that the four LPNs in dispute are not statutory supervisors.

II. THE APPROPRIATENESS OF ENTERTAINING THE INSTANT UNIT CLARIFICATION PETITION:

In support of its position that there is no basis for clarifying the unit, the Union notes that the parties, over 20 years ago, stipulated that the LPNs were not supervisors within the meaning of the Act and that the parties have enjoyed a stable bargaining relationship, including coverage of the LPNs, for more than 2 decades. Under such circumstances, the Union argues that the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001), involving the supervisory status of nurses in health care facilities, is not a "special circumstance" permitting the clarification of the existing unit to exclude the LPNs in question. Essentially, the Union contends that the Petitioner has not established that the law applicable to any unit determination previously made by the Board in this case has changed. On the other hand, the Petitioner maintains that both *Kentucky River* and *NLRB v. Health Care and Retirement Corp. of America*, 511 U.S. 571 (1994), constitute changes in the law regarding the supervisory status of nurses, and represent the type of special circumstance permitting the clarification of a bargaining unit. Finally, the Union argues, contrary to the Petitioner, that even assuming that *Kentucky River* constitutes a "special circumstance," the Petitioner waived its right to challenge the inclusion of the LPNs by bargaining with the Union in a unit, including that classification, for over 20 years.

Based upon a careful review of Board precedent, I do not agree with the Union's position and find it appropriate to entertain the clarification petition. In reaching the conclusion that the unit clarification petition is appropriately before me, I am guided by the principles articulated in the Board's decision in *University of Dubuque*, 289 NLRB 349 (1988). In *Dubuque*, the union involved had for approximately 15 years represented essentially a unit of the university's faculty. At the time the clarification petition was filed on November 9, 1983, the union and university were parties to a 3-year contract effective by its terms from August 15, 1981 through August 15, 1984. The university sought to clarify the unit to exclude its faculty on the ground that they were managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), which established new criteria for determining whether faculty were employees or excluded managers under the Act.

The union in *Dubuque*, like the Union here, argued that the petition should be dismissed as there were no grounds for clarifying the unit and that to process the petition during the contract term would disrupt a stable bargaining relationship. The Board disagreed, noting that in view of *Yeshiva* that "it is appropriate to clarify a unit composed of faculty to exclude those who are managerial and, therefore, not employees within the meaning of the Act." Here, similar rationale applies. Indeed, the only difference between the subject case and *Dubuque* appears to be that in *Dubuque* the parties' relationship was based on voluntary recognition, whereas here the unit was established following a Board-conducted election based on a stipulated unit. Such distinction, however, has little bearing on whether a unit clarification petition is appropriate.

In *Dubuque*, the Board noted that the clarification petition was filed 208 days prior to the expiration of the contract but only 98 days before the scheduled commencement of negotiations. The Board found that it was appropriate to process the clarification petition even though it was filed during the term of the relevant contract. Here, the petition was filed on July 12, 2001, only 50 days before the expiration of the contract. Under the rationale of *Dubuque*, the petition here is clearly timely. Moreover, like in *Dubuque*, the longstanding relationship between the parties in a unit, including the LPNs, does not render the clarification petition inappropriate. Finally, the number of employees whose status is in dispute here comprises only a small fraction of the unit while those in dispute in *Dubuque* made up essentially the entire unit. Thus, the danger of a potential disruption to the parties' bargaining history in the subject case is much less than in *Dubuque*.

I.O.O.F. Home of Ohio, Inc., 322 NLRB 921 (1997) and *Grancare d/b/a Premier Living Center*, 331 NLRB No. 9 (2000), relied upon by the Union, do not support its position that the clarification petition should be dismissed. In *I.O.O.F. Home*, the union filed a petition seeking to represent a unit of LPNs. Initially, the employer took the position that the LPNs were supervisors and demanded a hearing to resolve the issue. Thereafter, the employer waived its right to a hearing and entered into a stipulation for an all-LPN unit. The labor organization prevailed in the subsequent election and on September 2, 1994, the union was certified as the bargaining representative for the LPNs. On January 24, 1995, after having participated in several bargaining sessions, the employer notified the union that it had "reconsidered" the status of the LPNs and believed them to be supervisors and ceased bargaining. On January 26, 1995, the union filed an unfair labor practice charge alleging that the employer was engaging in

conduct violative of Section 8(a)(1) and (5) of the Act. While the unfair labor practice charge was pending, in February 1995, the employer filed a unit clarification petition alleging that the LPNs were supervisors. The petition was administratively dismissed on the ground that by its conduct the employer was estopped from raising the supervisory issue. In the subsequent litigation of the unfair labor practice case, the Board, relying upon *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941), found that, because the supervisory issue could have been litigated in the initial representation case proceeding, the employer was "barred from raising the issue now." *I.O.O.F. Home of Ohio, Inc*., 322 NLRB at 922.

In *Grancare*, the employer executed a stipulation agreement resulting in an election on May 8, 1998. The union won the election and was certified as the bargaining representative of the unit consisting of LPNs and service and maintenance employees. The employer filed objections to the election in which it asserted, directly contrary to its stipulation in the election agreement, that the LPNs were supervisors. On October 30, 1998, the Board adopted the hearing officer's finding that the employer was bound by its election agreement with respect to the supervisory status of the LPNs. On November 12, 1998, the employer filed a unit clarification petition seeking to clarify the unit to exclude the LPNs. In considering the appropriateness of the clarification petition in *Grancare*, the Board noted that in *I.O.O.F. Home*, it had "reaffirmed its long standing rule that in the absence of newly discovered and previously unavailable evidence or special circumstances, an employer may not challenge the validity of a union's certification based on the belief that unit members are statutory supervisors if it failed to raise the issue during the representation proceeding." *Grancare, Inc., Inc. d/b/a Premiere Living Center*, 331 NLRB No. 9 slip op. at 1. In *Grancare*, the Board found that no newly discovered and previously unavailable evidence or special circumstances were present and that the employer was bound by its stipulation agreement.

I.O.O.F. Home and *Grancare*, as well as the cases overruled by these two decisions, [3]/ involved situations where employers agreed or stipulated to the unit placement of specific individuals. Thereafter, without any intervening circumstances, the employers attempted to exclude the same individuals from the bargaining units through clarification petitions or related unfair labor practice or other representation proceedings. The Board held the employers to their agreements and found that they could not use clarification petitions or other proceedings, absent newly discovered or unavailable evidence or special circumstances, to renege on their stipulations or agreements as to the status of individuals included in the units. Succinctly, if the individuals in those cases were not supervisors when the employers stipulated to include them in the units, they were not supervisors when their status was challenged in the clarification or other Board proceeding. Here, however, unlike *I.O.O.F. Home* and *Grancare* but like *Dubuque*, there was an intervening circumstance after establishment of the unit and preceding the filing of the clarification petition. Thus, in *Dubuque*, between the establishment of the unit and the filing of the petition, the Supreme Court's decision issued in *Yeshiva* and here, between the certification of the unit and the filing of the clarification petition, the Supreme Court issued its decision in *Kentucky River*.

[3]/ In *Grancare*, the Board stated that it had overruled *McAlester General Hospital*, 233 NLRB 589 (1977), in *I.O.O.F. Home* and proceed to overrule several other similar cases. *Grancare, Inc. d/b/a Premiere Living Center*, 331 NLRB No. 9 at n. 5. However, the Board did not overrule *Dubuque*.

In rejecting the labor organization's position that the clarification petition was not appropriate in *Dubuque*, the Board stated: "First, in light of the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), it is appropriate to clarify a unit composed of faculty to exclude those who are managerial and, therefore, not 'employees' within the meaning of the Act." *University of Dubuque*, 289 NLRB at 349. Although the Board did not specifically use the term "special circumstance," it is clear that the Board in *Dubuque* viewed the issuance of the Supreme Court's decision in *Yeshiva* as an intervening event permitting the processing of a clarification petition and certainly would have considered it a "special circumstance" as that term is used in *Grancare*. Otherwise, in *Grancare*, the Board would have overruled or distinguished *Dubuque*. [4]/ Regardless of the terminology used by the Board in *Grancare* in explaining under what circumstances the filing a clarification petition would be appropriate, I find that the Supreme Court's decision in *Kentucky River* is an intervening or "special circumstance" which permits the processing of the clarification petition. *University of Dubuque*, supra. See also, *Sherwood Corporation d/b/a Parkview Manor*, 321 NLRB 477 (1996) (in a refusal to bargain case, the Board reconsidered, based on the issuance of the Supreme Court's decision in *Health Care and Retirement Corp.*, the supervisory status of nurses whom the parties agreed were not supervisors in the underlying representation case). [5]/

The Union, relying on *Michael Konig t/a Nursing Center at Vineland*, 318 NLRB 901 (1995), further argues that even if *Kentucky River* constitutes a special circumstance, the Petitioner waived its right to challenge the certification by bargaining with the Union for many years in a unit which included the LPNs. In *Konig*, a union filed a representation petition seeking to represent the employer's LPNs. At a subsequent representation hearing, the employer agreed that all but three of the LPNs were employees. Following a finding that that none of the disputed LPNs were supervisors, the union won an election and was certified. Thereafter, the parties entered into negotiations. Before the parties reached an agreement on a contract, approximately 2 years following certification, the Supreme Court issued its decision in *Health Care and Retirement Corp.* The employer informed the labor organization that in view of the Court's decision in *Health Care and Retirement Corp.,* it considered the LPNs to be supervisors and declined to engage in further bargaining. The union filed an unfair labor practice charge in

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[4]/ For example, in *Grancare,* in addition to the cases overruled, the Board distinguished *Washington Post Co*., 254 NLRB 168 (1981), which at first blush appears to present issues similar to those in *Dubuque*. (In *Washington Post*, the parties agreed to leave the unit placement of certain employees open in order to obtain an election agreement. A unit clarification petition was filed almost immediately after the certification. Under such circumstances, the Board processed the unit clarification petition without any intervening or special circumstances). Moreover, prior to *I.O.O.F. Home* and *Grancare*, the Board would apparently clarify a unit without any showing of newly discovered or unavailable evidence or special circumstances. See, e.g., *McAlester General Hospital*, supra.; *Times World Corp*., 151 NLRB 947 (1965). These and similar cases were specifically overruled by *I.O.O.F. Home* and *Grancare*. By not overruling *Dubuque*, the Board clearly recognized that the issuance of a Supreme Court decision, changing existing law, constitutes the type of "special circumstance" referred to in *Grancare* permitting the processing of a unit clarification petition.

[5]/ The Petitioner also maintains that the Supreme Court's 1994 decision in *Health Care and Retirement Corp.* constitutes a special circumstance supporting its unit clarification petition. In view of the timing of the Supreme Court's decision in *Kentucky River*, I deem it unnecessary to consider whether *Health Care and Retirement Corp*. also constitutes a special circumstance which would support processing the subject unit clarification petition.

which the Board reviewed the record developed before the Administrative Law Judge and, relying on the standards enunciated in *Health Care and Retirement Corp*., found that the LPNs were not supervisors within the meaning of the Act. *Michael Konig t/a Nursing Center at Vineland*, 318 NLRB at n. 1. Accordingly, *Konig* does not stand for the proposition advanced by the Union; rather it demonstrates merely that the Board applied the new *Health Care and Retirement Corp.* standard in reviewing the status of the employees in question.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find it appropriate to entertain the clarification petition. *University of Dubuque*, supra. Having found that the unit clarification petition is appropriately before me for resolution, I must determine whether the LPNs in dispute are supervisors within the meaning of the Act.

III. THE SUPERVISORY STATUS OF THE EMPLOYEES IN DISPUTE:

(a) Factual Summary:

The Petitioner's 143-bed nursing home is divided into two wings -- the East Wing, described as the intermediate care facility, and the West Wing, described as the skilled nursing unit. Each wing consists of four hallways. A nursing station is centrally located in each of the two wings. There are three shifts of employees who work at the facility. A charge nurse is assigned to each wing on each shift. In this connection, two of the LPNs involved in this proceeding, Betty Jones and Tasha Wynn, function primarily as charge nurses. The other two LPNs in issue, Mary Stephens [6]/ and Laurine Ingle, [7]/ are classified as medication nurses.

The Petitioner's nursing department is under the supervision of the director of nursing (DON), Barbara Middleton. Reporting to the DON in the chain of authority are 2 unit supervisors (both RNs); the medicare coordinator (an RN); 11 other RNs; the 4 LPNs in issue; a medical records clerk; and the nurses' aides -- 2 of whom are medication aides (nurses' aides certified to pass medications orally) and 2 or 3 of whom are rehabilitation aides (nurses' aides who have been trained to assist residents rehabilitate their motor skills).

The DON and unit supervisors work Monday through Friday, 8 a.m. to 5 p.m. The three shifts worked by other RNs, LPNs and nurses aides are a 7 a.m. to 3 p.m. shift, a 3 p.m. to 11 p.m. shift and an 11 p.m. to 7 a.m. shift. Charge nurses, however, are expected to work 15 to 30 minutes beyond the end of their shift in order to meet with the charge nurse coming on duty and to provide some overlap of coverage. It appears that the charge nurses work 4 days on and 2 days off, with relief charge nurses filling in the gaps. Under the Petitioner's Nursing Services Policy, however, an RN must be on call 24-hours a day. On the shifts beginning at 3 p.m. and 11 p.m., the DON, the medicare coordinator or one of the unit supervisors is on call. Moreover, the record reflects that at least for the past year all of the charge nurses assigned to the skilled nursing care wing have been RNs. Although they may work on any shift, the LPN charge nurses apparently are typically scheduled on the 3 p.m. to 11 p.m. shift or 11 p.m. to 7 a.m. shifts in the

[6]/ Also spelled in the record as "Stevens."

[7]/ Also spelled in the record as "Engle."

immediate care wing. The two LPNs who currently serve as charge nurses are relatively new employees and work a variety of shifts. Historically, the Petitioner has employed a greater number of LPN charge nurses than its current complement.

On the 7 a.m. to 3 p.m. shift in the intermediate care wing, in addition to the charge nurse, there are ordinarily a medication aide and seven nurses' aides and in the skilled nursing care wing a treatment nurse, the two medication nurses and 10 nurses aides. On the 3 p.m. to 11 p.m. shift in the intermediate care wing, in addition to the charge nurse, there are ordinarily a med-aide and four nurses aides and in the skilled nursing care wing three RNs and six nurses' aides. On the 11 p.m. to 7 a.m. shift in the intermediate care wing, in addition to the charge nurse, there are two nurses' aides and in the skilled nursing care wing two nurses and six nurses' aides. The employees for all shifts are scheduled monthly by the DON.

The charge nurses begin their workday by conferring with the charge nurse on their wing from the previous shift and getting the assignment sheets covering the residents in their wing. The assignment sheets contain the names of residents who are in adjacent rooms in a specific hallway. The charge nurse apparently assigns a specific assignment sheet to each aide. The aide is responsible for taking care of the residents on the sheet. The assignment sheet indicates the type of intermittent care the residents require. It also contains any special instructions for dealing with the resident -- such as flagging that the resident needs "total care," can ambulate with a walker, needs smoke breaks, etc. Any special instructions are placed on the assignment sheets either by a charge nurse at some point in the resident's care or by the medical records tech at the direction of the unit supervisor who consults with the charge nurses. It does not appear that the two LPN charge nurses in issue, both of whom are relatively new employees, have ever added any special instructions to the assignment sheets. They have, however, given oral instructions or noted particular types of care on the assignment sheets when meeting with the aides at the beginning of the shift. For example, a charge nurse may, based on the nurses' assessment made on the previous shift, order that a particular resident's vital signs be checked. In addition, the assignment sheets may include the break periods for the aides. If not included on the assignment sheets, the charge nurse on duty assigns the breaks. The charge nurse also assigns an aide or aides to accompany residents to a room in which resident smoking is allowed. Likewise, the charge nurse on duty assigns an aide to serve as the meal monitor. The meal monitor is responsible for making sure that no resident is missed in the distribution of meals. This is usually a more senior aide who knows the needs of the residents.

In the event a shift is short staffed or if other issues create an imbalance in the work load, the charge nurse reassigns the care of residents to a different aide or changes the duties and responsibilities of the aides on duty. Aides responsible for residents in rooms in the same area of the facility apparently often work together and if dissension develops between them, the charge nurse is responsible for changing their assignments so that they are separated. The charge nurse, taking into consideration the experience of the aides, may assign a less experienced aide to an area with a more experienced aide. Moreover, the charge nurse occasionally assigns an aide to a resident based upon either positive or negative feelings by the resident toward the aide. Otherwise, it appears that aides are assigned to residents by the charge nurses on a rotating basis.

During the shift, the charge nurse engages in some monitoring of the aides' work, such as following up at mealtime to assure that all residents have been fed and that all residents have been changed. The charge nurse checks the sheets on which the aides record residents' vital signs to see if the vital signs have been taken in a timely manner. As part of her follow-up, the charge nurse may order that additional vital signs be taken from a resident, direct an aide to clean a patient or send an aide to fulfill a resident's special request for food or other items.

In addition to their oversight of the aides, much of the charge nurses' time in the intermediate care unit, in which the LPNs work, is devoted to completing paperwork relating to the 63 residents in that unit, including keeping their charts current. The charge nurses in the intermediate care unit also have various duties not directly related to the direction of aides such as performing certain skin and breathing treatments on residents, taking telephone and in-person orders from physicians, and answering calls from and meeting with family members. It appears, however, that because charge nurses in the intermediate care unit do not have an office and work out of the nurse's station, that even when performing these tasks, aides interrupt them with questions. Moreover, aides are required to advise a charge nurse if they intend to take a break, leave for lunch, or engage in other activities that may have an impact on their assigned duties.

If an aide calls in to advise that he/she will not be at work, the aide will speak with the DON if she is present; at other times, he/she will speak with the charge nurse on duty. The determination of who covers for an absent aide is subject to an established procedure. Initially, aides who are off duty are called to see if they wish to volunteer for work. Secondly, aides are asked to work over from their shift or split the shift between two volunteer aides. If there are no volunteers, the least senior aide from the preceding shift (with the exception of the 11 p.m. to 7 a.m. shift) is required to stay over. The Petitioner may, however, attempt to assign residents, who would have been cared for by the absent aide, to other aides or reassign an aide from the other wing.

The parties apparently agree that the charge nurses have the authority to give, and have given, oral and written warnings. It appears, however, that the "oral warnings" consist merely of a cautionary conversation with the aide, without any memorialization being made of the discussion. In contrast, written warnings are placed in a counseling book by the DON where they are retained for 1 year. There is no requirement that written warnings be cleared with higher management before issuance by charge nurses and several examples of such warnings issued by the LPN charge nurses are in the record. The only lockstep progressive disciplinary procedure appearing in the record is for absenteeism. However, higher supervision utilizes a progressive disciplinary approach and documentary evidence in the record discloses that more severe discipline, such as a 2-day suspension, may be based in part on previous written warnings issued by charge nurses. A charge nurse apparently may suspend an employee in a situation where an employee is determined unfit for work, such as in an inebriated state. However, if the DON is present at the time, the individual would be sent to her. Moreover, it appears that even if the DON is not present, the DON or a unit supervisor is consulted.

The charge nurses apparently are not formally involved in the training of new aides. However, when charge nurses see problems developing in a particular area, they may conduct

in-service training for aides. The in-service may be mandated either by the DON or by the charge nurse, on her/his own initiative. In-services may be given orally by the charge nurse or the aide may be asked to merely read the relevant instructions. Aides are required to sign a form acknowledging "attendance" at the in-service. The more formal in-services are conducted by higher level management.

In theory, new aides are to be evaluated every 30, 60 and 90 days. These evaluations are performed by the charge nurses. Thereafter, the Petitioner's policy provides that employees receive yearly evaluations. However, it does not appear that there has been strict adherence to such intervals in recent years. There is no monetary compensation or other benefit to the aide that results from these evaluations. There is, however, a place on the evaluation form to indicate whether continued employment is recommended. On each evaluation in the record, the question relating to whether an employee should be retained was either ignored or continued employment was indicated. Moreover, there was no testimony of anyone ever having recommended on an evaluation form that an employee not be retained. Although the DON, who reviews the evaluation, would apparently give considerable weight to a recommendation against employee retention by a charge nurse, she would also speak with the aide to get his/her side of the story before making a final decision on whether to retain the employee.

The two LPN medication nurses work in the skilled nursing wing on the 7 a.m. to 3 p.m. shift, which is under the direction of an RN charge nurse. Stephens became a medication nurse in 1997. Prior to becoming a medication nurse, Stephens worked in various other LPN positions for the Petitioner, including several years (1995-1997) as a charge nurse in the intermediate care wing. Ingle has worked for the Petitioner since 1980 as a LPN in various positions, including treatment nurse, charge nurse and since 1995 medication nurse. In carrying out their responsibilities, medication nurses make two medication pass rounds per shift during which they distribute and administer medications by mouth, through "G-tubes" or by any other delivery system, with the exception of "iv push medications" which must be administered by an RN. The medication nurses also administer, as needed, (PRN) medications for pain, for bowel movement or nausea. The medication nurses change catheters, insert nasogastric tubes, check blood sugar levels, perform tracheotomy maintenance and do a variety of other similar work. The medication nurses also perform daily skin assessments and treatments and monitor the intake of fluids by "MG feeders."

It does not appear that there is any daily oversight of aides by the medication nurses nor any formal assignment of aides to assist them. However, if a medication nurse needs help, such as turning a patient, she may ask an aide to assist. Medication nurses may also advise an aide of any resident care issues that she observes, e.g., whether a resident needs changing, oral care, or other assistance. The record discloses that a medication nurse may instruct an aide to accompany the smoking residents on their smoke breaks, but it is unclear how often this occurs, particularly as such assignments are typically made by the charge nurse on duty. Similarly, medication nurses apparently believe they have some authority to tell aides who might be sitting around the nurses station to go back to work, but there is no indication that this has ever actually occurred.

When the RN charge nurse in the skilled nursing unit goes on break or to lunch, she advises either the RN treatment nurse or one of the two LPN medication nurses where she will be in the

event of an emergency. During the charge nurse's absence the individual selected to fill her position performs the duties generally handled by the charge nurse such as taking phone calls, taking orders from doctors and placing doctors' orders on the residents' charts. There is no indication that the duties assumed by the medication nurses during the charge nurse's absence involve any specific oversight responsibilities with respect to the aides.

During the 6 years she has served as a medication nurse, Ingle has not substituted for a charge nurse, except during the time that charge nurses are on break or at lunch. Stephens relates that on two occasions in the past year she worked as a relief charge nurse and on approximately four other occasions worked into the following shift as a charge nurse. However, the record is devoid of any evidence that the medication nurses have actually exercised any supervisory indicia on such occasions.

The medication nurses do not perform evaluations on employees and there is no probative record evidence that they have ever disciplined aides. Ingle recalls that she was advised, at an in-service, that she had the authority to issue oral and written warnings to aides. However, Ingle was unable to recall, even in the most general time frame, when she was informed of this authority. Since Ingle previously served as a charge nurse, it is unclear whether the in-service took place while she was a charge nurse or after she became a medication nurse. After becoming a medication nurse, Ingle has never issued any discipline.

Likewise, there is no evidence that Stephens has issued any formal warnings while serving as a medication nurse. [8]/ Indeed, in the only situation in the record in which it might be expected that Stephens, while serving as a medication nurse, would have issued a warning to an aide (a situation involving the use of inappropriate and loud language in a resident's room) Stephens did not take any action but chose merely to report the offending aide to the DON. In the factual summary portion of its brief, the Petitioner asserts, in an apparent reference to this incident, Stephens "wrote up several employees for using inappropriate language in patient care areas." The record testimony does not support this assertion and no documentary evidence of such a written warning is in the record. The evidence discloses that Stephens merely reported the matter to the DON who was responsible for handling all subsequent actions relating to the incident. As the Petitioner correctly points out in its brief, the aides filed grievances against Stephens over the incident. However, the grievances (Pet. Ex. 10) allege that Stephens was guilty of harassment of the aides and do not assert that the aides received a written warning from Stephens. Moreover, the grievances do not allege that Stephens exercised any supervisory authority in connection with the incident. Contrary to the suggestion in the Petitioner's brief, the filing of the grievances by the aides involved against Stephens under the circumstances, does not constitute any evidence that Stephens is vested with supervisory indicia.

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[8]/ Prior to becoming a medication nurse, Stephens was also employed as a charge nurse during which time she issued written warnings. The factual summary in the Petitioner's brief (p. 7) asserting that Stephens has issued written warnings is not fully supported by the record. Although the record discloses that Stephens issued written warnings in 1995, while employed as a charge nurse, there is no evidence that she has issued any written warnings after becoming a medication nurse in 1997. Moreover, as explained in the text of Decision, the Petitioner's contention in its brief that, in December 2000, Stephens wrote up several employees for using "inappropriate language," is not supported by the record.

(b) Conclusions as to the Supervisory Status of the LPNs:

Section 2(11) of the Act defines a supervisor as a person:

> . . . having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

It is noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." See, **Senate Rep. No. 105, 80th Cong., 1st Sess. 4**, reprinted in **1 NLRB Legislative History of the Labor Management Relations Act, 1947**. See also, *Chicago Metallic Corp.,* 273 NLRB 1677, 1688 (1985); *NLRB v. Bell Aerospace Co.,* 416 NLRB 267, 280-281, 283 (1974). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.,* 254 NLRB 433, 437 (1981). Thus, the exercise of "supervisory authority" in merely a routine, clerical or perfunctory manner does not confer supervisory status. *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.,* supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). Moreover, in the event that "the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia." *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989).

In reaching my decision with respect to the supervisory status of the LPNs in dispute, I must apply the principles established by the Board in the above cases as well as the holding of the Supreme Court in *Kentucky River*. [9]/ Initially, in *Kentucky River*, the Supreme Court approved the Board's well-established precedent that the party asserting supervisory status has the burden of proof to establish such status. *NLRB v. Kentucky River Community Care, Inc*., 121 S. Ct. 1863-66. Here, the Petitioner asserts that the LPNs are statutory supervisors and seeks to clarify the unit to exclude them. Thus, the Petitioner has the burden of proof to establish their supervisory status.

A statutory supervisor must possess, at least, one of the indicia specified in Section 2(11) of the Act. *NLRB v. Kentucky River Community Care, Inc*., 121 S. Ct. at 1867; *Allen Services*

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[9]/ In its brief (p. 2), the Union appears to suggest that if *Kentucky River* permits the processing of the clarification petition, a determination as to the supervisory status of the LPNs in dispute should be based solely on whether they "responsibly direct using independent judgment" which was the indicia considered by the Supreme Court in *Kentucky River*. I disagree with this position. Although *Kentucky River* dealt with the authority of individuals to responsibly direct using independent judgment, I am not restricted to a consideration of this indicia in determining the supervisory status of the LPNs in question. To consider only one supervisory indicia could lead to the anomaly of finding individuals, who do not responsibly direct, not to be supervisors even though they possess and exercise other supervisory indicia. Accordingly, I have considered all Section 2(11) supervisory indicia arguably applicable to the LPNs in dispute.

Co., 314 NLRB 1060 (1994); *Queen Mary,* 317 NLRB 1302 (1995). Moreover, a statutory supervisor must exercise supervisory indicia in a manner requiring the use of independent judgment. With respect to most Section 2(11) indicia, the use of independent judgment is self evident. However, when considering the supervisory authority to responsibly direct, it is more difficult, particularly in the health care industry, to define the use of independent judgment. In the health care field, the Board previously held that employees do not use independent discretion when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer specified standards. In *Kentucky River*, the Supreme Court rejected this categorical exclusion. [10]/ The Supreme Court found that such a categorical exclusion was improper, overbroad and "contrary to the statutory language." *NLRB v. Kentucky River Community Care, Inc*., 121 S. Ct. at 1871.

Although the Supreme Court rejected the Board's categorical exclusion of independent judgment based on the exercise of ordinary professional or technical judgment, it did accept two aspects of the Board's interpretation of independent judgment. The Supreme Court agreed with the Board that independent judgment is ambiguous and that many nominal supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status under the Act. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. at 1867. The Supreme Court also recognized that judgment may be reduced below the statutory supervisory threshold by detailed regulations issued by an employer. Id. Moreover, the Supreme Court held that the Board has discretion to determine the scope of judgment that qualifies as independent judgment within the meaning of Section 2(11) of the Act. Id. Finally, the Supreme Court suggested that the Board might preserve coverage for professional and technical employees by developing a "limiting interpretation of the supervisory function of responsible direction" that distinguishes employees who direct the manner of others' performance of discrete tasks from employees who direct other employees. *NLRB v. Kentucky River Community Care, Inc*., 121 S. Ct. at 1871. Succinctly, the central teaching of *Kentucky River* is that the nature of the judgment exercised (i.e., professional, technical or experimental) does not determine whether that judgment is "independent" in the statutory sense.

In *Kentucky River*, the Supreme Court did not hold that all nurses are supervisors. Indeed, the Court did not even discuss the job duties of the nurses at issue nor did it decide whether those individuals are supervisors. Thus, the determination of the supervisory status of nurses and other individuals remains a fact-specific inquiry. In determining whether disputed individuals are supervisors within the meaning of Section 2(11) of the Act, the Board may, therefore, continue to employ the traditional analysis of independent judgment approved by the Supreme Court in *Kentucky River*. Such judgment, if constrained by the direction of higher officials, who have not delegated the power to make significant decisions, as well as judgment constrained by employer-specified standards, is routine and does not confer supervisory status within the meaning of Section 2(11) of the Act. Moreover, the Supreme Court in *Kentucky River* suggested that individuals who merely direct the nature of the others' performance of discrete tasks, rather than directing other employees, have not engaged in responsible direction so as to confer supervisory status. *NLRB v. Kentucky River Community Care, Inc*., 121 S. Ct. at 1871. See also, *Providence Hospital*, 320 NLRB 717 (1996) (the Supreme Court in *Kentucky River* noted that the Board in *Providence Hospital* had drawn a distinction between individuals who

[10]/ In practice, the Board previously limited its categorical exclusion to "responsibly to direct."

directed the manner of others' performance of discrete tasks from those who directed other employees). [11]/

In considering whether individuals responsibly direct utilizing independent judgment, the Board looks to established constraints or guidelines under which the individuals work, and the accountability of the individuals whose supervisory status are in dispute. *Providence Hospital*, supra. It is also noted that individuals who rotate into or fill supervisory positions on a very limited or sporadic basis are not necessarily supervisors within the meaning of the Act. *General Dynamics Corp*., 213 NLRB 851 (1974); *Northern Montana Health Care*, 324 NLRB 752 (1997); *Ohio Power Co*., 80 NLRB 1334 (1948), enfd. denied 176 F.2d 385 (6th Cir. 1948), cert. denied 338 U.S. 899 (1949); *Wurster, Bernardi and Emmons, Inc*., 192 NLRB 1049 (1971). However, if an individual is vested with supervisory authority, the sporadic exercise of such authority does not detract from a supervisory finding. *Capital Transit Company*, 114 NLRB 617 (1957); *Beverly Enterprise-Massachusetts, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999).

Contrary to the Union, the Petitioner contends that the LPNs here are supervisors within the meaning of the Act based upon their authority to transfer, suspend, assign, discipline and responsibly direct employees as well as their ability to effectively recommend employees' discharge. Having carefully considered and applied the Supreme Court's interpretation in *Kentucky River* of independent judgment in the exercise of supervisory indicia and the Board's general principles in determining supervisory status, I find that the two LPNs regularly assigned as charge nurses are supervisors within the meaning of the Act. I have reached the opposite conclusion, however, with respect to the two LPN medication nurses and find that they are not supervisors within the meaning of the Act.

1. <u>The Ability to Schedule or Transfer Employees</u>:

None of the LPNs whose supervisory status is in dispute schedule employees nor is there any indication that they, on their own authority, transfer employees to another wing or shift. There is some evidence that LPN charge nurses are occasionally involved in the temporary transfer of aides between wings due to coverage problems. However, the evidence is inconclusive as to the extent of their role in such transfers. Therefore, I conclude that the Petitioner has failed to sustain the burden of establishing that any of the LPNs in dispute exercise or possess supervisory authority in scheduling or transferring employees. *Phelps Community Medical Center*, supra.

2. <u>The Ability to Suspend an Employee</u>:

The record does not establish any authority on behalf of the medication nurses to suspend employees. With respect to the charge nurses, the record discloses that the only occasion where they could suspend an employee involves the hypothetical situation where an aide is unfit to work, e.g., in an inebriated state. In such a situation, in the absence of the DON, the charge

[11]/ In *Kentucky River*, the Supreme Court specifically noted that the Board, in the case below, did not address whether the direction given by the nurses was "responsible" direction within the meaning of the Act. Thus, the Court left open the possibility that, depending on the facts, the Board might find nurses or other professionals not to be supervisors because they are not held accountable for how the employees they direct perform their tasks.

nurse would not allow the aide to work on the floor and could send the employee home. The charge nurse would, however, consult with the DON or a unit supervisor (the one on call) in such a situation. Based on the practice of consulting on such issues with an acknowledged supervisor, any independent judgment utilized by the charge nurses in this type of situation does not reach the supervisory threshold contemplated by the Act. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). (*Chevron* was cited with approval by Supreme Court in *Kentucky River*. In *Chevron*, the Board found that licensed officers were not supervisors where their discretion was circumscribed by standing orders and need to contact supervisors when major problems occurred.) Accordingly, the Petitioner has not sustained its burden, under *Kentucky River*, of establishing that any of the LPNs in issue have the independent authority to suspend employees. *Chevron Shipping Co*., supra.

3. The Ability to Effectively Recommend Discharge:

The Petitioner asserts that the LPN charge nurses can effectively recommend discharge because, as part of their evaluation of aides, they are, or will be, required to recommend whether aides are retained. The DON testified, however, that if a LPN charge nurse ever recommended the nonretention of an aide, she would meet with the aide involved and obtain his/her side of the story before making a final decision on the fate of the employee. Thus, the evaluations are obviously not the sole source upon which the tenure of the evaluated employee is based. Moreover, the evaluations are not used to determine wage increases for aides. Under such circumstances, the evaluations prepared by the LPN charge nurses (medication nurses do not prepare evaluations) do not constitute effective recommendations for action establishing supervisory authority. See., e.g., *Passavant Health Center,* 284 NLRB 887 (1987); *Newton-Wellesly Hospital*, 219 NLRB 699, 701 (1975). Accordingly, the Petitioner has not met its burden of establishing that the LPNs exercise supervisory authority in evaluating employees.

4. The Ability to Discipline:

The Petitioner argues that the LPNs in issue possess the independent authority to issue oral warnings and that these warnings constitute discipline. The oral warnings are, however, merely informal admonishments with no memorialization of their ever having been given. Under well settled Board precedent, which was not disturbed by *Kentucky River*, the authority to caution employees about their conduct in such a manner is not considered discipline and does not meet the threshold necessary to establish supervisory status. See, e.g. *Alois Box, Co.,* 326 NLRB 1177, 1178 (1998); *Bay Area -Los Angeles Express*, 275 NLRB 1063, 1077 (1985).

However, the record shows that the LPN charge nurses possess authority to issue written warnings and that this authority is exercised without clearance from higher management. Moreover, contrary to the Union's assertion, the record establishes that these warnings are relied on by higher management to justify more severe discipline, including suspensions. [12]/ The warnings are retained in a book for a period of 1 year. The possession of such authority

[12]/ Not only is there testimony on this point but among the documents placed into the record is a Warning Form referencing a suspension. Although the form was signed by both the LPN charge nurse and the department head, it articulated a reliance on prior warnings as a justification for the suspension.

establishes the LPN charge nurses' supervisory status within the meaning of the Act. See, e.g., *Health Care & Retirement Corp. d/b/a Heartland of Beckley* 328 NLRB 1056 (1999). [13]/ Accordingly, I find that the Petitioner has sustained its burden of establishing that the charge nurses have the authority to discipline employees, exercising independent judgment, by issuing written disciplinary warnings and that they are supervisors within the meaning of the Act.

With respect to the medication nurses, however, there is no probative evidence establishing that they have implemented discipline, either when functioning as medication nurses or during the short periods of time when they cover for the charge nurses during lunch or breaks. [14]/ Although Stephens has sporadically substituted as a charge nurse, such substitution is too limited (Stephens served as a relief nurse on two occasions and worked overtime on four occasions during the past year) to confer supervisory status, particularly absent any evidence that she actually issued discipline on those occasions. *Ohio Power Co.*, supra. The Board precedent applicable to situations where employees sporadically substitute for supervisors was not disturbed by *Kentucky River*. Under such circumstances, the fact that Stephens occasionally substitutes as a charge nurse, without having ever issued any discipline, is not sufficient, standing alone, to confer supervisory status with respect to the indicia under consideration (authority to discipline employees). See, *Phelps Community Medical Center*, supra; *Jakel Motors*, 288 NLRB 730 (1988); *St. Francis Medical Center* 323 NLRB 1046 (1997); *Carlisle Engineered Products*, 330 NLRB No. 189, slip op. 3 (2000). *Ohio Power Co*., supra. In *Michigan Masonic Home*, 332 NLRB No. 150 (2000), involving a similar disciplinary issue, the Board, in finding that supervisory status did not exist, noted that the record was devoid of any evidence that the nurses in dispute, like the medication nurses here, implemented or effectively recommended discipline. Thus, the Petitioner has not met its burden, under *Kentucky River*, of showing that the medication nurses possess or exercise true supervisory authority in the discipline of employees. See, e.g., *Webco Industries,* 334 NLRB No. 77 (2001); *Michigan Masonic Home*, supra.

5. <u>The Ability to Assign and Responsibly Direct Employees</u>:

The authority to assign work or responsibly direct is sufficient to confer supervisory status, assuming that the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. Whether the authority exercised in the assignment or direction of work by LPNs requires the use of independent judgment is influenced by whether the LPNs are held accountable and have the ability to independently discipline the employees to whom the work is assigned. [15]/ It is noted, however, that the nature of the judgment exercised

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[13]/ In *Manor West, Inc*., 313 NLRB 956 (1994), cited by the Union in support of its argument that the LPN charge nurses may not impose discipline, the administer of the facility involved could have any "incident report" or "corrective action" form filled out by an LPN independently investigated by an RN -- a practice not found in the instant case. Moreover, in *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491, 506 (1993), also cited by the Union, there was no evidence that writeups by LPNs carried any weight in the imposition of other discipline. Consequently, both cases are clearly distinguishable on their facts from the instant matter.

[14]/ Although Stephens reported what she believed was aide misconduct to the DON, it is clear that merely reporting infractions to higher management is not a supervisory function. See, e.g., *Illinois Veterans Home at Anna L.P.,* 323 NLRB 890 (1997). (See text at p. 19 and fn. 9, supra)

[15]/ I note that the record establishes that the aides are aware of the LPN charge nurses' ability to issue warnings.

(e.g., professional, technical or experiential) does not determine whether that judgment is "independent" in the statutory sense. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. at 1875.

A careful review of the record discloses that the LPN charge nurses utilize their independent judgment in assigning and directing the aides and that such assignment and direction of employees are not of a merely routine or clerical nature. The assignment and direction of aides by the LPN charge nurses clearly involve the responsible direction of employees rather than merely directing the manner in which discrete tasks are performed. In reaching this conclusion, I am aware that "work assignments made to equalize employees' work on a rotational or other rational basis are routine assignments; [footnote omitted] assignments based on assessment of employees' skills when the differences in skills are well known have been found routine; [footnote omitted] asking, without authority to require, employees to come in early or work late is routine; [footnote omitted] and adjusting employees' schedules to meet the vagaries of manpower needs is not necessarily supervisory. [footnote omitted]" *Providence Hospital*, 320 NLRB at 727.

The charge nurses' responsibility is not limited to the mere assignment of aides on a rotating basis, to equalize workload or for coverage. Indeed, the LPN charge nurses assign or reassign aides because of personnel related issues, such as separating two aides working in the same area who are not getting along, assigning less experienced aides to work with more experienced aides and reassigning aides to accommodate resident preferences. In addition, charge nurses, based upon their evaluation of residents, may assign aides, e.g., to check residents' vital signs on a more frequent basis. Charge nurses also assign additional tasks to be performed by aides by entering such duties on aides' assignment sheets or by merely advising them orally of the extra duties. Finally, LPN charge nurses schedule breaks for the aides and aides must advise a charge nurse when they leave their work area to begin their break. [16]/

With respect to the direction of work, the charge nurses advise aides of any special needs of residents and monitor the aides' work by following up to make sure that the aides have performed their duties in a proper manner. If a charge nurse observes deficiencies in an aide's performance, the charge nurse may conduct an immediate in-service to assure that the aide is aware of the appropriate manner in which to carry out her/his duties or the charge nurse may independently issue warnings for any dereliction of duty.

Under *Kentucky River*, the responsibilities possessed and exercised by the LPN charge nurses in the instant case establish that they responsibly direct employees using independent judgment. The record discloses that the LPN charge nurses have the authority to make assignments of work considering the abilities and experience of employees; [17]/ to inspect the

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[16]/ The Union argues that "aides switch break times whenever they want." This contention is not supported by the record. Rather, aides who wish to switch breaks must advise the charge nurse. Although the one aide who testified indicated that the charge nurse has never vetoed such a switch, this does not impact on the charge nurses' ability to do so.

[17]/ See., e.g., *McClatchy Newspapers Inc*., 307 NLRB 773, 779 (1992).

work of and to direct aides to correct deficiencies in their work; [18]/ and to schedule work assignments and breaks. [19]/ Accordingly, I find that the Petitioner has sustained its burden, under *Kentucky River*, of establishing that the LPN charge nurses assign and responsibly direct the work of aides using independent judgment in a manner conferring supervisory status.

With respect to the LPN medication nurses, however, I conclude that they do not assign or responsibly direct employees exercising independent judgement. As pointed out by the Petitioner in its brief, the job description for the LPNs, apparently including both the LPN charge and medication nurses, [20]/ provides that the "purpose of your job position is to supervise the day to day nursing services and personnel under your supervision during your tour of duty." (Pet. Ex. 4) The job description also delegates to the LPNs "the administrative authority, responsibility and accountability necessary for carrying out [their] assigned duties." The job description sets forth specific duties and responsibilities for the LPNs, including the direction of the day to day functions of nursing activities, the administration of corrective discipline, the transfer and discharge of employees and the interpretation and application of policies and procedures. Petitioner is correct that the performance of the duties set forth in the job description would confer supervisory status. Although the LPN charge nurses possess and exercise, at least, some of the supervisory tasks set forth in the job description, there is, however, no evidence in the record that the medication nurses perform any of the supervisory duties and responsibilities referred to in the job description in a manner requiring the use of independent judgment as contemplated by *Kentucky River*. It is the actual possession and exercise of supervisory indicia that determines an individual's supervisory status not one's job title. *New Fern Restoririm Co*., 175 NLRB 871 (1969). Conclusory evidence, e.g., duties set forth in a job description, "without specific explanation that the [disputed person or classification] in fact exercise independent judgment," does not establish supervisory status. *Sears, Roebuck & Co*., 304 NLRB 193 (1991). Thus, the job description for LPNs if applicable to the medication nurses does not by itself confer supervisory status.

The only evidence appearing in the record that medication nurses assign employees involve the occasional (and the record is devoid of the frequency of such occasions) direction of an aide to assist residents with their smoke breaks. It appears that the charge nurses are responsible for assigning aides to cover smoke breaks and medication nurses, by occasionally directing an aide to assist residents with such breaks, do not exercise responsible direction requiring independent judgment as contemplated by the Act. Medication nurses do not have any responsibility for actually overseeing the work of any employees. The medication nurses may occasionally seek an aides' assistance in turning a resident or point out to an aide that a resident needs assistance. It is settled that to request the assistance of, or point out the needs of a resident to, an aide, which

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[18]/ See, e.g., *Dunkirk Motor Inn, Inc. d/b/a Holiday Inn of Dunkirk-Fredonia, 211* NLRB 461 (1974). The Union notes certain precedent to support its argument that merely reminding employees of their duties or instructing employees concerning an employer's rules do not confer supervisory status. Although I agree with such a proposition, in the instant case an aide's failure to adequately perform her/his duties may, and has, resulted in a charge nurse issuing a disciplinary warning.

[19]/ See, e.g., *The New Jersey Famous Amos Chocolate Chip cookie Corporation*, 236 NLRB 1093 (1978).

[20]/ The job description does not specifically state that it is applicable to medication nurses. However, the record testimony indicates that the job description is given to all LPNs.

is only incidental to the medication nurses actual duties, does not confer supervisory status [21]/ and *Kentucky River* does not impact such precedent.

The record discloses that the medication nurses might, if the situation arose, instruct aides standing around the nurses station to return to work. However, there is no evidence that this occurs and appears to be primarily a hypothetical situation. [22]/ In any event, such isolated incidents or admonishments are not sufficient to establish an individual's supervisory status. [23]/ Indeed, judgment exercised in such an isolated, routine and perfunctory manner, without any evidence, as here, that it could be enforced, falls below the "statutory threshold" required to establish supervisory status within the meaning of *Kentucky River*. Indeed, in analyzing the supervisory status of LPNs under *Kentucky River*, the Board recently held that LPNs who performed routine duties, similar or more substantial than those carried out by the medication nurses here, did not exercise independent judgment and were not supervisors within the meaning of Section 2(11) of the Act. *Beverly Health and Rehabilitation Services, Inc*., 335 NLRB No. 54, n. 3 (2001). See also, *Nymed, Inc. d/b/a Ten Broeck Commons*, 320 NLRB 806 (1996); *Dynamic Science, Inc.*, 334 NLRB No. 57 (2001), citing *Kentucky River*.

Finally, the substitution by medication nurses for charge nurses for short periods when the latter individuals take a break or go to lunch does not confer supervisory status. Likewise, the fact that Stephens, during the past year, has served as relief charge nurse on two occasions and worked overtime as charge nurse on four occasions does not "cloak" her with supervisory authority. I recognize that if the delegation of a supervisory indicia has been established, the infrequent or sporadic exercise of the indicia does not detract from a finding that an individual possesses Section 2(11) authority. *Capital Transit Company*, supra. Contrary to the implication in Petitioner's brief , however, there is no probative evidence that the medication nurses administer discipline or that they responsibly direct aides using independent judgment on those occasions when they fill in for charge nurses. Indeed, there are no examples in the record where medication nurses have exercised a higher degree of authority, when filling in for charge nurses, than they possess when performing their regularly assigned duties. The failure to exercise genuine supervisory authority is probative that it does not actually exist. *Michigan Masonic Home*, supra; *Lakeview Health Center*, 305 NLRB 75, 78 (1992).

Based on the foregoing, the entire record and careful consideration of the arguments of the parties at the hearing and in their briefs, I find that the Petitioner has met its burden of establishing that the LPN charge nurses are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall clarify the unit to exclude them. However, I find that the Petitioner has not sustained its burden establishing that the medication nurses are supervisors. Thus, the

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[21]/ See, e.g., *Capital Transit Company*, 114 NLRB 617 (1955).

[22]/ Witness responses to such posed hypotheticals are accorded little weight. See, e.g., *General Security Services,* 326 NLRB 312 (1998). Moreover, the absence of evidence that authority actually has been exercised is supportive of the position that it does not actually exist. *Michigan Masonic Home, Inc*., supra.

[23]/ See, e.g., *Alois Box Co., Inc*., 326 NLRB at 1178 (1998) (telling an employee that if he did not do his job properly he would sent home insufficient to establish supervisory authority); *General Security Services,* 326 NLRB at 312 (simply telling employees to return to their assigned posts insufficient to establish supervisory authority).

medication nurses are properly included in the unit and I shall dismiss the petition as its pertains to them.

ORDER

IT IS HEREBY ORDERED that the bargaining unit currently represented by the Petitioner be, and it hereby is, clarified to exclude the LPN charge nurses.

IT IS FURTHER ORDERED that the petition, as it relates to the medication nurses be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, NW, Washington, D.C. 20570. This request must be received by the Board in Washington by **October 11, 2001**.

Dated at Cincinnati, Ohio this 27th day of September 2001.

/s/ Richard L. Ahearn

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